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IN THE

Supreme Court of the United States

October Term, 1949

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, AND
SWITCHMEN'S UNION OF NORTH AMERICA,
Petitioners,

v.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INDEX

PAGE

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 3

STATUTES AND EXECUTIVE ORDER INVOLVED 4

STATEMENT 4

The facts on the merits 4

The proceedings in the District Court 7

The proceedings on review and the facts concerning mootness 8

SPECIFICATION OF ERRORS TO BE URGED 10

REASONS FOR GRANTING THE WRIT 11

1. In holding the controversy moot, the Court of Appeals has decided a question of general importance erroneously and in conflict with applicable decisions of this Court 11

2. The ruling of the District Court that the Norris-LaGuardia Act is inapplicable fails to give proper effect to an applicable decision of this Court, and presents a question of substance relating to the construction of a federal statute which has not been but should be decided by this Court 17

3. The ruling of the District Court that the threatened strike was unlawful and subject to injunction presents a question of general importance which should be settled by this Court, and is in conflict with applicable decisions of this Court 22

PAGE

4. The ruling of the District Court that the Executive Branch had a "right of action" presents a question of general importance which should be settled by this Court, is inconsistent with several acts of Congress, and also is in conflict with applicable decisions of this Court 27

CONCLUSION 35

APPENDIX 36

CITATIONS

Cases:

Altvater v. Freeman, 319 U. S. 359 15

American Foundries v. Tri-City Council, 257 U. S. 184.. 23

Apex Hosiery Co. v. Leader, 310 U. S. 469 34

Arthur v. Oakes, 63 Fed. 310 (C. C. A. 7) 23

Boise City Irr. & Land Co. v. Clark, 131 Fed. 415 (C. C. A. 9) 14

Cole v. Ralph, 252 U. S. 286 16

Debs, In re, 158 U. S. 564 ..... 26, 27, 33, 34

Denton v. Yazoo & M. V. R. Co., 284 U. S. 305 20

Dismuke v. United States, 297 U. S. 167 16

Donovan v. Pennsylvania Company, 199 U. S. 279 16

Federal Trade Commission v. Goodyear Co., 304 U. S. 257 14

Gay Union Corporation v. Wallace, 71 App. D. C. 382, 112 F. 2d 192, cert. denied 310 U. S. 647 14

General Committee v. Missouri-Kansas-Texas R. Co., 320 U. S. 323 31

Howard v. Wilbur, 166 F. 2d 884 (C. C. A. 6) 14

PAGE

Hunt v. Crumboch, 325 U. S. 821 24

J. I. Case Co. v. Labor Board, 321 U. S. 332 20

Kilbourn v. Thompson, 103 U. S. 168 29

Labor Board v. Fansteel Corp., 306 U. S. 240 23

Leonard & Leonard v. Earle, 279 U. S. 392 14

Liberty Oil Co. v. Condon Bank, 260 U. S. 235 16

McGrain v. Daugherty, 273 U. S. 135 14

National Labor Relations Board v. Knoxville Pub. Co., 124 F. 2d 875 (C. C. A. 6) 20

Newport News Co. v. Schauffler, 303 U. S. 54 14

Pacific Tel. Co. v. Kuykendall, 265 U. S. 196 2

Shaffer v. Carter, 252 U. S. 37 2

Smith v. Illinois Bell Tel. Co., 270 U. S. 587 2

Southern Pacific Co. v. Interstate Comm. Comm., 219 U. S. 433 ..... 14, 15

Southern Pac. Terminal Co. v. Interstate Comm. Comm., 219 U. S. 498 ..... 13, 14

Standard Oil Co., The, v. Anderson, 212 U. S. 215 20

Sterling v. Constantin, 287 U. S. 378 2

Story Parchment Co. v. Paterson Co., 282 U. S. 555 16

Switchmen's Union v. Board, 320 U. S. 297 31

Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. 803 (C. C. S. D. Ohio) 24

United States v. American Federation of Musicians, 318 U. S. 741 21

United States v. Freight Assn., 166 U. S. 290 ..... 13, 14

United States v. Hutcheson, 312 U. S. 219 ..... 21, 27

PAGE

United States v. Mine Workers, 330 U. S. 258 ..... 12, 17, 20, 21, 22, 26, 27, 33

United States v. Railway Employes' Dept., 286 Fed. 228 (N. D. Ill.) 15

United States v. Standard Oil Co., 332 U. S. 301 30

United States v. Workingmen's Amalgamated Council, 54 Fed. 994 (C. C. E. D. La.), affirmed 57 Fed. 85 (C. C. A. 5) 15

Wabash R. Co. v. Hannahan, 121 Fed. 563 (C. C. E. D. Mo.) 23

Walling v. Haile Gold Mines, 136 F. 2d 102 (C. C. A. 4) 14

Walling v. Mutual Wholesale Food & Supply Co., 141 F. 2d 331 (C. C. A. 8) 14

Statutes:

Act of August 29, 1916 (10 U. S. C. 1361).... 5, 18, 20, 22, 32

Clayton Act, Section 20 (29 U. S. C. 52) 24

Erdman Act, 30 Stat. 424 (1898) 30

Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 33

Labor Management Relations Act, 1947 (29 U. S. C. Supp. 141 *et seq.*) 4, 10, 22, 24, 25, 31, 32

Secs. 206-209 25

Sec. 208 31

Sec. 209 31

Sec. 210 ..... 25, 31

Sec. 212 25

Sec. 305 25

National Labor Relations Act, Sec. 13 (49 Stat. 457), as amended by Sec. 101 of the Labor Management Relations Act, 1947 (29 U. S. C. Supp. 163) 24

PAGE

Newlands Act, 38 Stat. 103 (1913) 30

Norris-LaGuardia Act (29 U. S. C. 101 *et seq.*) 4, 7, 10, 17, 21, 24, 25, 27, 32, 33

Railway Labor Act of 1926, 44 Stat. 577 (45 U. S. C. 151 *et seq.*) 3, 4, 5, 7, 10, 13, 22, 24, 25, 30, 31, 32, 33
Sec. 2 ..... 24, 30
Sec. 5 ..... 5, 24
Sec. 6 ..... 4, 24
Sec. 10 ..... 5, 24

Railway Labor Act of 1934, 48 Stat. 1185 24

Sherman Act, 26 Stat. 209, as amended 24

Transportation Act of 1920, Title III, 41 Stat. 456, 469.. 30

U. S. Code, Title 28, Sec. 1254(1) 2

War Labor Disputes Act (50 U. S. C. App. 1501-1511).. 17, 33
Sec. 6 ..... 25, 26

Miscellaneous:

Adams, John, *Works* I, page 186 29

Congressional Record:
Vol. 53, page 11492 18
Vol. 93 (daily issue), page 3951 31

Constitution:
Art. I, Sec. 8, Clauses 3 and 7 28
Art. I, Sec. 8, Clause 18 28
Art. II, Sec. 3 28

Executive Orders:
No. 9412, December 27, 1943, 8 F. R. 17395 13
No. 9727, May 17, 1946, 11 F. R. 5461 13
No. 9728, May 21, 1946, 11 F. R. 5593 18

The *Federalist*, Nos. 47 and 48 (Madison) 29

PAGE

Letter of Attorney General, February 2, 1949, *Labor Relations,* Hearings before Senate Committee on Labor on S. 249, pt. 1, 1949, page 263 13

Ops. Atty. Gen., Vol. 40, No. 83, pp. 8-9 (1944) 22

Taft, William Howard, *Our Chief Magistrate and His Powers,* p. 139 29

Washington, *Farewell Address* 29, 34

Willcox and Landis, *Government Seizures in Labor Disputes,* 34 Cornell L. Q. 155 (1948) 22

Wilson, Woodrow, *Congressional Government,* pp. 272-273, 282-283 29

IN THE

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No. .....

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, AND
SWITCHMEN'S UNION OF NORTH AMERICA,
Petitioners,

v.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

Your petitioners, Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, and Switchmen's Union of North America, respectfully pray that a writ of certiorari issue to review the judgment of

the United States Court of Appeals for the District of Columbia Circuit, entered on April 25, 1949, vacating the orders of the United States District Court for the District of Columbia and remanding the cases to that court with instructions to dismiss the complaint.[1]

OPINIONS BELOW

The opinion of the Court of Appeals (2 R. 76)[2] has not yet been reported. The District Court's oral opinion stating its reasons for granting the permanent injunction (1 R. 216-220) is reported in 79 F. Supp. 485.

JURISDICTION

The judgment of the Court of Appeals was entered on April 25, 1949 (2 R. 77). That court has stayed its mandates pending application for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

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[1] The Court of Appeals entered one judgment covering two appeals from the District Court. The first appeal (No. 9892 in the Court of Appeals) was taken by petitioners from an order granting a preliminary injunction and denying petitioners' motion to dismiss the complaint (1 R. 89). The second appeal (No. 9924 in the Court of Appeals), filed before the Court of Appeals took any action on the first appeal, was taken from the final judgment granting a permanent injunction (1 R. 237). The questions raised on both appeals are substantially the same. The Court of Appeals heard the appeals together, held the controversy moot (2 R. 76), and entered one judgment disposing of both appeals on that ground (2 R. 77). Since the preliminary judgment presumably has merged in the final judgment (*Shaffer* v. *Carter*, 252 U. S. 37, 44; *Smith* v. *Illinois Bell Tel. Co.*, 270 U. S. 587, 588; *Pacific Tel. Co.* v. *Kuykendall*, 265 U. S. 196, 205, 206; *Sterling* v. *Constantin*, 287 U. S. 378), the discussion herein will be directed primarily to the judgment of the Court of Appeals as it relates to the final injunction.

[2] The record is printed in two volumes, each numbered from page 1. Volume 1 contains the proceedings in the District Court and will be referred to as "1 R.". Volume 2 contains the proceedings in the Court of Appeals and will be referred to as "2 R.".

QUESTIONS PRESENTED

1. In the middle of 1947 a dispute over wages and working rules arose between petitioners and many of the nation's carriers by rail. Negotiations failed and a strike was called. That strike call was canceled while mediation and cooling-off procedures provided by the Railway Labor Act were pursued. After those procedures had been more than satisfied without reaching agreement, petitioners finally called a nation-wide strike for May 11, 1948. On May 10 the President seized the railways by Executive Order, and just a few hours later respondent filed its complaint and secured an ex parte temporary restraining order enjoining the threatened strike. That restraint was continued by a preliminary injunction, and then by a permanent injunction issued July 2, 1948, which remains in effect. At respondent's request petitioners and the private carriers continued their negotiations after the seizure and injunction. While under compulsion of that injunction, petitioners then made the best terms they could with the carriers. But nation-wide disputes of this kind between petitioners and the carriers are a constantly recurring process, they frequently reach the stage of strike threats or even government seizure, and it is virtually inevitable that there will be a recurrence of controversy between the present parties. Moreover, the questions of the right of the Executive to seek, and the power of the courts to grant, such an injunction are of great public importance. The initial question is whether under these circumstances the controversy is moot. Does the *pro tem* settlement of a labor controversy under the compulsion of an injunction operate to preclude the judicial determination of legal issues respecting such injunction, particularly where the controversy is of an obviously recurring nature and involves matters of great public interest?

2. If the controversy is not moot, the questions to be considered on the merits are:

(a) Whether the Norris-LaGuardia Act (29 U. S. C. 101 *et seq.*) deprived the District Court of jurisdiction to issue an injunction against this admittedly peaceful strike arising out of a labor dispute between the private carriers and their employees.

(b) Whether there is any basis for equitable intervention to enjoin such a peaceful strike which has for years been recognized as lawful by the courts and Congress alike.

(c) Whether, in any event, the executive branch of the government has any "right of action" to invoke equity to enjoin such a strike on the ground that it is necessary to protect interstate commerce and transmission of the mails, when no act of Congress establishes that right in the Executive and particularly when Congress has in several statutes (including the Railway Labor Act (45 U. S. C. 151 *et seq.*) and the Labor Management Relations Act, 1947 (29 U. S. C. Supp. 141 *et seq.*)) consistently denied that right.

STATUTES AND EXECUTIVE ORDER INVOLVED

The pertinent provisions of the various statutes involved are set out in the Appendix. Executive Order No. 9957, under which the railways were seized, is set out in full at 1 R. 266-269.

STATEMENT

The facts on the merits. Petitioners are three unincorporated labor organizations representing employees in the railway industry (Fdgs. 16, 17, 18, 1 R. 231-233). On June 20, 1947, petitioners served on the private carriers which employ their members notices for requested changes in working rules, and on the same date the carriers served similar notices on petitioners (1 R. 242, 93, 275, 142, 319-320, 193), all in accordance with Section 6 of the Railway Labor Act. On September 30, 1947, petitioners also served on the carriers notices requesting increases in wage

rates (id.). Negotiations between the parties failed, and petitioners called a strike for February 1, 1948 (Fdg. 1, 1 R. 225).

Pursuant to advice of the National Mediation Board, the President of the United States on January 27, 1948, acting under Section 10 of the Railway Labor Act, issued Executive Order No. 9929 creating an Emergency Board to investigate and report on the dispute in thirty days (Fdgs. 2, 3, 1 R. 225). On March 27, 1948, the Emergency Board transmitted its report and recommendations to the President (Fdg. 4, 1 R. 225). On April 6, 1948, petitioners advised the carriers that they declined to accept the recommendations of the Emergency Board, but requested a conference to discuss the matters considered in the Board's report (Fdg. 6, 1 R. 226). Conferences between petitioners and the carriers were held from April 14 to April 27, 1948, but no agreement was reached (Fdg. 7, 1 R. 226).

In accordance with Section 10 of the Railway Labor Act, which provides that for thirty days after the Emergency Board's report to the President no change in the conditions out of which the dispute arose shall be made by the parties except by agreement, the so-called cooling-off period expired on April 27, 1948 (Fdg. 8, 1 R. 226). On April 28, 1948, the National Mediation Board, acting pursuant to Section 5 of the Railway Labor Act, advised the parties that it desired further discussions (Fdg. 8, 1 R. 226). Accordingly, further Mediation Board proceedings were held in Chicago from April 29 to May 4, 1948, but no agreement was reached (Fdg. 9, 1 R. 226). On April 30, 1948, several days after expiration of the cooling-off period required by the Railway Labor Act, petitioners notified the private carriers that all employees represented by them would withdraw from service at 6:00 a. m. on May 11, 1948, unless the issues were settled before that time (Fdg. 9, 1 R. 226).

On May 10, 1948, the President of the United States, purporting to act under the Act of August 29, 1916 (10 U. S. C.

1361), issued Executive Order No. 9957. By its terms, the United States took possession and control as of noon of that date, through the Secretary of the Army, of the carriers involved in the dispute (Fdg. 10, 1 R. 226-227). A few hours later on the same day, the Secretary of the Army conferred with petitioners' chief executives and requested them to continue to perform labor on the railroads and to call off the strike. But, on learning that the Secretary did not intend to negotiate with them concerning working rules and wage rates (1 R. 38, 176, 183, 200-201, 213), the executives declined (Fdg. 11, 1 R. 227).

On the evening of the same day, May 10, respondent filed its complaint and the District Court granted an ex parte temporary restraining order enjoining the threatened strike (Fdgs. 19, 20, 1 R. 233). That order was later twice extended to continue in effect until June 11, 1948 (1 R. 28-29, 46-47). Thereafter, the restraint was continued by the preliminary injunction and later the permanent injunction.

At no time after the seizure did respondent enter into, or offer to enter into, negotiations with petitioners concerning terms of employment (1 R. 39, 186, 205-206). Pursuant to the injunction, petitioners' members continued to perform services on the railroads under the terms in effect prior to seizure (1 R. 39, 177-178, 202). After the seizure, petitioners and the private carriers continued their negotiations in an effort to settle their private dispute, respondent at no time participating in those negotiations as a party to the dispute (Fdg. 12(d), 1 R. 228, 38-39, 106-107, 183, 186, 203-205). Respondent at all times persisted in the position that it was not its function to enter into negotiations with either side over the terms of employment (1 R. 312-313, 181, 98, 103, 176, 179-180, 201). The Secretary of the Army encouraged the continued negotiations between the private parties, respondent's purpose being to hold the railways only so long as necessary to permit the parties to settle their private dispute and to return the railways as soon as that dispute was terminated (Fdg. 12(d), 1 R. 228-229, 38, 54-55, 103).

The proceedings in the District Court. Petitioners moved to dismiss the complaint on the grounds that (1) the District Court lacked jurisdiction because of the provisions of the Norris-LaGuardia Act and (2) there was no basis for equitable relief against such a peaceful strike, particularly in view of the provisions of the Railway Labor Act which preclude an injunction under the circumstances of this case (1 R. 29). On June 11, 1948, the District Court denied petitioners' motion to dismiss and granted respondent's motion for a preliminary injunction (1 R. 86-88). Petitioners immediately appealed from that order on June 15, 1948 (1 R. 89) and docketed the case in the Court of Appeals on June 16, 1948 (2 R. 78). On the same day, petitioners moved to advance that appeal for hearing (2 R. 1), but the Court of Appeals denied the motion (2 R. 5).

Petitioners raised the same defenses in their answer (1 R. 222-223). The District Court found, after trial, that the threatened strike would deprive the country of essential transportation service, obstruct the flow of interstate commerce and transmission of the mails, interfere with the discharge of necessary government functions, and imperil the national health and safety (Fdgs. 15(b)-15(g), 1 R. 230-231; C. of L. 8(b)-8(f), 1 R. 235-236). It held the Norris-LaGuardia Act inapplicable, concluded that the executive branch is entitled to equitable relief against even a peaceful strike if it will have such consequences, and ruled that neither the Railway Labor Act nor any other act of Congress precludes such relief (1 R. 217-220, 235-236). Accordingly, on July 2, 1948, it entered its permanent injunction, which remains in effect and provides as follows (1 R. 236-237):

> the defendants, and each of them, and their officers, agents, servants and employees, and all persons in active concert or participation with them, be and they are hereby enjoined from in any manner encouraging, ordering, engaging in, or taking any part in a strike in the transportation by railroad system of the United

> States, or from in any manner interfering with or affecting the orderly continuance of work in the said railway system, and from taking any action which would interfere with this Court's jurisdiction in the premises.

Petitioners immediately appealed from that judgment on July 6, 1948 (1 R. 237), and docketed the case in the Court of Appeals on July 9, 1948 (2 R. 82).

The proceedings on review and the facts concerning mootness. After the appeal from the final judgment, petitioners and the private carriers on July 8, 1948, entered into a "Proposal for Settlement" of their dispute (2 R. 36-37). As a result of that understanding, respondent on July 9, 1948, returned the railroads to the private carriers (2 R. 38-39). On July 15, 1948, respondent filed in the District Court a motion to discharge the permanent injunction on the ground that it was no longer necessary. Petitioners opposed the motion, and the District Judge who had issued the injunction denied the motion on the ground that "the cause is not moot", saying (2 R. 16):[3]

> It was absolutely necessary that [petitioners] should make some arrangement with their employers. They simply could not go along without making some sort of contract of continuance.
>
> So the Court thinks that for the Court to undertake to take advantage of that situation, which the Court has forced upon them, and to say that the case is now moot and that they cannot have any opportunity to have their rights decided by the higher courts would be not only juvenile, not only immature, but exceedingly unfair.

Thereafter, on August 2, 1948, respondent filed a similar motion in the Court of Appeals (2 R. 9). Petitioners opposed that motion on the ground that the controversy is not moot (2 R. 14).

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[3] Certified copies of the District Court's order and the transcript of record on the hearing are on file in this Court in *Brotherhood of Locomotive Engineers et al.* v. *United States*, No. 277, October Term, 1948.

On August 11, 1948, petitioners and the private carriers executed two further agreements and a memorandum of understanding settling the matters in dispute (2 R. 42, 60, 63).[4] Subsequently, on August 17, 1948, respondent filed in the Court of Appeals a motion "for disposition of cause on the grounds of mootness" (2 R. 24, 83), which petitioners also opposed (2 R. 64).

Having found it impossible to obtain a hearing on the merits in the Court of Appeals during the summer months, petitioners chose to apply to this Court for a writ of certiorari before judgment. On August 13, 1948, petitioners moved the Court of Appeals to suspend further proceedings pending application for certiorari (2 R. 5). On September 14, 1948, petitioners filed their application, and on September 17, 1948, the Court of Appeals granted the motion to suspend further proceedings (2 R. 7). Respondent opposed that petition for certiorari on the grounds that the case was moot and that, in any event, the circumstances were not such as to warrant the extraordinary procedure of review here before judgment below. This Court denied the petition on November 15, 1948. *Brotherhood of Locomotive Engineers et al.* v. *United States*, 335 U. S. 867.

Respondent then moved the Court of Appeals to set the pending motions on mootness for hearing before argument on the merits, but the motion was denied (2 R. 75). Consequently, the case was briefed, argued, and submitted to the Court of Appeals on both the merits and mootness. On April 25, 1949, the Court of Appeals rendered its per curiam opinion holding the controversy moot (2 R. 76), and on the same day entered its judgment vacating the orders of the District Court and remanding the cases with instructions to dismiss the complaint (2 R. 77).

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[4] A still further agreement on the disputed matters was executed on November 12, 1948, but has never been made a part of the record in this case.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the controversy is moot.

2. In failing to hold that the District Court had no jurisdiction because of the Norris-LaGuardia Act.[5]

3. In failing to hold that the threatened peaceful strike was lawful, and that consequently there was no basis for equitable relief.

4. In failing to hold that, in any event, the executive branch of the Government had no right of action to invoke equity powers to enjoin such a threatened strike in the absence of an act of Congress authorizing such an action, and particularly in view of the Railway Labor Act, the Labor Management Relations Act, 1947, and other acts which demonstrate a congressional policy against such an action.[6]

5. In failing to hold that the injunction is broader than justified by the conduct found unlawful by the District Court.[7]

---

[5] The District Court made a finding of fact (Fdg. 10, 1 R. 226-227) and a conclusion of law (C. of L. 5, 1 R. 235) that immediately upon seizure the Government became the employer of all employees performing services on the seized carriers. We intend Specification of Error No. 2 to include the failure of the Court of Appeals to hold that this conclusory finding of fact and this conclusion of law were erroneous.

[6] The District Court made a finding of fact (Fdg. 15(e), 1 R. 231) and a conclusion of law (C. of L. 8(e), 1 R. 236) that the threatened strike would frustrate the powers conferred by the Constitution and by Acts of Congress upon the Executive Branch of the Government. No particular power was specified. We intend Specification of Error No. 4 to include the failure of the Court of Appeals to hold that this conclusory finding of fact and this conclusion of law were erroneous.

[7] This error is not argued in this petition but, in the event certiorari is granted, petitioners desire to reserve the right to argue that the terms of the injunction are broader than justified by the conduct found unlawful by the District Court.

REASONS FOR GRANTING THE WRIT

1. In holding the controversy moot, the Court of Appeals has decided a question of general importance erroneously and in conflict with applicable decisions of this Court.

The decision of the Court of Appeals is of the greatest importance to the three petitioning unions and the hundreds of thousands of railway employees represented by them, to other labor organizations and their members in industries of national importance, and to the public. In ultimate effect, the ruling means that petitioners may be forever foreclosed from securing authoritative appellate review on the question of their right to strike. Or, considered another way, it means that, once a district court has enjoined a threatened strike, petitioners must then either forego any partial relief by agreement for the many months necessary to secure review by a Court of Appeals and this Court, or take what they can get by such a settlement and give up the right to appellate review.

The circumstances in the instant case make it clear that the time element forces petitioner into that dilemma. The dispute between petitioners and the private carriers arose initially in June and September 1947 (1 R. 242, 93, 275, 142, 319-320, 193). Both private negotiations and Railway Labor Act procedures were pursued, without success, until a strike was finally called for May 11, 1948 (Fdgs. 1-9, 1 R. 225-226). After respondent seized the railways and secured an injunction on May 10, 1948, a "Proposal for Settlement" was executed on July 8, 1948 (2 R. 36-37). Thereafter, negotiations were carried on until the dispute was further settled by the agreements of August 11, 1948 (2 R. 42, 60, 63) and the agreement of November 12, 1948. Petitioners had meanwhile made every effort to secure expedited review of the injunction orders, and they subsequently continued to do so. But the judgment of the

Court of Appeals was not rendered until April 25, 1949. And, if this petition is granted, there can be no decision on the merits here until the end of 1949 at the earliest. Thus negotiations between the private parties covered a period of well over one year before settlement was reached. After May 10, 1948, petitioners were forced to negotiate under the compulsion of an injunction which denied them the right to strike. Yet the Court of Appeals has ruled that petitioners could secure review of that injunction only so long as they refused to settle the dispute. On this principle, petitioners would have been required to hold out for two and one-half years from the time the dispute arose, and more than one and one-half years from the time the initial injunction was granted, in order to obtain review by this Court.

When such an injunction is issued, three alternatives are open. One is to disobey. Another is to obey, seek appellate review, but refuse to negotiate until the rights of the parties are authoritatively determined. The third is to obey, continue negotiations, and simultaneously seek appellate review to determine the rights of the parties in the immediate and future disputes. *United States* v. *Mine Workers,* 330 U. S. 258, teaches the unwisdom of the first course. The second may be against public interest, since it forces a stalemate in negotiations for the time necessary to secure ultimate appellate decision. The third course is the one chosen by petitioners, and manifestly is in the public interest. The decision below, however, if left standing, requires the second course if petitioners' rights are ever to be authoritatively determined.

This same question may well arise in the future in the case of other unions as well as petitioners. The Attorney General has recently asserted that the executive branch of the Government has the right, with or without seizure or congressional authorization, to secure injunctions against strikes whenever it becomes necessary in the public interest:

> The inherent power of the President to deal with emergencies that affect the health, safety, and welfare of the entire Nation is exceedingly great * * * Access to its own courts is always available to the United States, in the absence of a specific statutory bar depriving the Government of the right to seek the aid of the Federal courts in such critical situations. (Letter of Attorney General, February 2, 1949, Labor Relations, Hearings before Senate Committee on Labor on S. 249, pt. 1, 1949, page 263.)

We disagree with that view. But it demonstrates the likelihood that both petitioners and other unions will in the future be confronted with the question of whether they must refuse to settle disputes in order to protect their right of review.

Not only does the decision below raise an important general question, but it is plainly erroneous and inconsistent in principle with a number of decisions of this Court and the lower federal courts:

(a) First, there is a real probability of renewed controversy here. Nation-wide bargaining between petitioners and the carriers is a recurring process under the Railway Labor Act and frequently reaches the stage of strikes or strike threats before resolution. As a result of labor controversies, the Government had previously seized the carriers of the nation in 1943 (Executive Order No. 9412, dated December 27, 1943, 8 F. R. 17395) and again in 1946 (Executive Order No. 9727, dated May 17, 1946, 11 F. R. 5461). Thus similar nation-wide disputes have reached the seizure stage three times in the short space of less than five years. Moreover, the assertion of the Attorney General mentioned above demonstrates that in the event of future threats of nation-wide strikes he will take similar action, whether or not the executive branch has authority to seize the railroads. This Court has consistently held that, where there is such a possibility of renewed controversy, the case is not moot. *United States* v. *Freight Assn.*, 166 U. S. 290, 307-310; *Southern Pac. Terminal Co.* v.

Interstate Comm. Comm., 219 U. S. 498, 514-516; *Southern Pacific Co.* v. *Interstate Comm. Comm.*, 219 U. S. 433, 452; *McGrain* v. *Daugherty*, 273 U. S. 135, 180-182; *Leonard & Leonard* v. *Earle*, 279 U. S. 392, 398; *Newport News Co.* v. *Schauffler*, 303 U. S. 54, 58; *Federal Trade Commission* v. *Goodyear Co.*, 304 U. S. 257.

The *Southern Pac. Terminal Co.* case, for example, involved a suit to enjoin enforcement of an Interstate Commerce Commission order requiring the Terminal Company to cease and desist for a period of two years from granting undue preferences to a particular shipper. The complaint was dismissed in the trial court and the Terminal Company appealed directly to this Court. The two year period having expired before the case was argued here, the Government contended that the case was moot. This Court held the case not moot because (1) the questions involved in such orders are usually continuing, (2) consideration of those questions "ought not to be, as they might be, defeated by short term orders, capable of repetition, yet evading review", and (3) interests of a public character were involved (219 U. S. at 515-516). The *Freight Association* case is similar in principle. All of the reasons relied upon for those decisions are present here, and in even more pointed form.

(b) Second, the principle discussed above applies with particular force where matters of public interest are concerned. This Court and the lower federal courts have consistently held that a case will not be considered moot if public questions are involved which require determination to serve as a guide to public officials in future similar matters. *United States* v. *Freight Assn.*, 166 U. S. 290, 307-310; *Gay Union Corporation* v. *Wallace*, 71 App. D. C. 382, 385, 112 F. 2d 192, 195, cert. denied 310 U. S. 647; *Boise City Irr. & Land Co.* v. *Clark*, 131 Fed. 415, 419 (C. C. A. 9); *Walling* v. *Haile Gold Mines*, 136 F. 2d 102, 105 (C. C. A. 4); *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331, 335 (C. C. A. 8); *Howard* v. *Wilbur*, 166 F. 2d

884, 885 (C. C. A. 6). The instant case squarely meets this test.

(c) Third, as the District Court so cogently stated (see page 8, *supra*) when it held the controversy not moot, the settlement was involuntary, having been forced upon petitioners by an injunction which denied them their lawful economic power in negotiations with the private carriers. Such a settlement forced by an injunction, which petitioners contend was beyond the jurisdiction of the court, is similar to the payment of royalties under the compulsion of injunction, which was held to preclude a plea of estoppel in *Altvater* v. *Freeman*, 319 U. S. 359, 364-365. For like reasons the present case is not moot.

(d) Fourth, the mere existence of the District Court's ruling on the merits will grievously affect the rights of petitioners in the future. Both this Court and the Congress have consistently recognized that the right to strike is necessary to enable workers to exercise liberty of contract in bargaining with their employers. The decision below has in large measure deprived petitioners of that vital right. So long as that decision stands, any threat of a nation-wide strike by petitioners will be a hollow gesture. Thus the decision will by its very existence have a profound effect upon the whole character of future collective bargaining between these parties. In this respect the case is like *Southern Pacific Co.* v. *Interstate Comm. Comm.*, 219 U. S. 433, 452, where a suit to enjoin a rate-fixing order was held not moot, even though the order had expired, because of "the influence and effect which the existence of the rate fixed for two years, if it were legal, would have upon the exercise by the railroads of their authority to fix just and reasonable rates in the future."

(e) Fifth, the decision below is in direct conflict with two long-standing district court decisions. *United States* v. *Workingmen's Amalgamated Council*, 54 Fed. 994, 995 (C. C. E. D. La., 1893), affirmed 57 Fed. 85 (C. C. A. 5,

1893); *United States* v. *Railway Employes' Dept.*, 286 Fed. 228 (N. D. Ill. 1923). Both cases involved suits by the United States to enjoin strikes, and in each it was held that settlement of the dispute did not moot the case.

Finally, the importance of reviewing the mootness question is increased by the great significance of the questions raised on the merits. Those questions, as we show later, go to the fundamental issue of whether petitioners are to be denied their lawful right to strike in any nation-wide dispute, even though Congress has never denied them that right but on the contrary has consistently recognized the right. If petitioners cannot have those questions reviewed in this case, it appears more than likely that they will be forever denied such right to strike without securing authoritative judicial review. We submit, therefore, that this is a further reason why this Court should review the ruling on the issue of mootness.

We further submit that, if this Court reviews the question of mootness, it should at the same time review the questions on the merits, even though they were not passed upon by the Court of Appeals. On certiorari this Court may dispose of all questions in the case, whether or not they have been ruled upon by the intermediate appellate court, and the Court frequently has done so. *Donovan* v. *Pennsylvania Company*, 199 U. S. 279, 292; *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 567; *Cole* v. *Ralph*, 252 U. S. 286, 290; *Liberty Oil Co.* v. *Condon Bank*, 260 U. S. 235, 245; *Dismuke* v. *United States*, 297 U. S. 167, 173-174. The Court has indicated that significant factors supporting decision here on questions not ruled upon below are whether the litigation has been protracted (*Cole* v. *Ralph, supra*) and whether the questions in their own right warrant certiorari (*Liberty Oil Co.* v. *Condon Bank, supra*). The questions on the merits here satisfy both requirements. Moreover, they are questions of law rather than of fact, thus minimizing the assistance to be provided by a decision below.

2. The ruling of the District Court that the Norris-LaGuardia Act is inapplicable fails to give proper effect to an applicable decision of this Court, and presents a question of substance relating to the construction of a federal statute which has not been but should be decided by this Court.

The District Court held the Norris-LaGuardia Act inapplicable for two reasons: (1) It concluded that, even if there had been no government seizure of the railways, the Norris-LaGuardia Act does not apply to "a situation where the entire transportation system of the country would be stopped". (2) It further held that, immediately upon government seizure, the workers became government employees and therefore the case is controlled by the *Mine Workers* decision (1 R. 217-220).

The first of these two reasons is squarely inconsistent with the decision of this Court in the *Mine Workers* case. There the majority agreed (page 278) "that Congress, in passing the Act, did not intend to permit the United States to continue to intervene by injunction in purely private labor disputes." The ruling of the trial court is to the effect that, even in purely private labor disputes, the Government can secure an injunction in any case where, in the opinion of the court, the effect upon the nation is sufficiently serious. Consequently it is clear that in this ruling the District Court has not given proper effect to an applicable decision of this Court.

Nor is the District Court's second reason sound. The *Mine Workers* case did not hold that, immediately upon seizure and with nothing more, the workers became government employees and the Norris-LaGuardia Act became inapplicable. The factors relied upon by the majority in reaching that result there were these: (1) The War Labor Disputes Act (50 U. S. C. App. 1501-1511), under which seizure was made there, in a sense made the workers government employees by providing a system for effecting changes in

terms of employment in seized plants, and by making strikes in such plants unlawful. (2) The Executive Order (No. 9728, 11 F. R. 5593) seizing the mines expressly authorized the Secretary of the Interior to negotiate with the miners as employees. (3) The miners voluntarily became employees of the Government, and in fact insisted that they were government rather than private employees (330 U. S. at 287). (4) The Government actually dealt with the miners as employees by entering into an entirely new contract with them covering terms of employment during the period of government possession (330 U. S. at 286-287), a contract which was executed eight days after seizure and had been in effect for six months before the dispute arose. (5) The Government's suit was brought to settle a dispute over interpretation of that contract between the Government and the miners.

In the instant case the circumstances are different in every material respect. (1) The Act of August 29, 1916, under which seizure purportedly was made, was not enacted to prevent strikes but solely to permit the Government, if the need should arise, to use the railroads for wartime traffic in preference to civilian traffic.[8] It contains no provision for negotiations on terms of employment, or making strikes unlawful during government possession, or in any other way suggesting that workers on seized railways are automatically impressed into government employment. (2) Executive Order 9957 contains no express provision authorizing or directing the Secretary of the Army to treat the workers as government employees by negotiating with them on terms of employment. On the contrary, Section 6 of the Order expressly recognizes "the right of the workers to continue . . . to bargain collectively . . . with . . . the owners of the carriers" and

[8] That such was its purpose, which is clear from the face of the statute, is further confirmed by its legislative history. See 53 Cong. Rec. 11492.

provides for "the effectiveness of such retroactive provisions as may be included in the final settlement of the disputes between the carriers and the workers" (1 R. 268). It is inconceivable that this Executive Order could be rightly construed to make the workers government employees, while at the same time giving the private carriers the power to agree with petitioners on wages and other terms of employment which were to be binding on the Government during the very period of its possession. (3) The railway workers did not voluntarily become government employees. To the contrary, on learning that the Secretary did not intend to negotiate with them on terms of employment (1 R. 38, 176, 183, 200-201, 213), they declined to accept government employment (Fdg. 11, 1 R. 227). They called off their strike and continued in service only under the compulsion of the injunction. (4) The Government never dealt with the workers as employees. (5) The seizure and the injunction suit were utilized, not to settle any dispute between the Government and the workers, but solely to prevent a strike while petitioners and the private carriers settled their differences. The seizure took place just eighteen hours before the time fixed for the strike. Less than eight hours after the seizure, respondent filed its complaint and secured the temporary restraining order. At no time did respondent enter into, or offer to enter into, negotiations covering terms of employment (1 R. 39, 186, 205-206). At respondent's request, the private parties continued after seizure to hold conferences for the purpose of negotiating for a settlement of their private dispute (Fdg. 12(d), 1 R. 228, 38-39, 106-107, 183, 186, 203-205). The sole aim of the Government was to encourage the private parties "to meet in an effort to reach an agreement under which the Government can turn the railroads back to private management" (1 R. 54, 103; Fdg. 12(d), 1 R. 228-229).

We think it clear that, under these circumstances, the railway workers never became government employees. It

is respondent's position that mere seizure, with nothing more, created that relationship. And that was the rationale of the District Court, for it concluded that immediately upon assumption of possession the United States became the employer (Fdg. 10, 1 R. 226-227, C of L. 5, 1 R. 235). But the Act of August 29, 1916, authorized only seizure of property, not commandeering of employees. It is not a compulsory draft law, and without such authority the President has no power to force the workers to become public employees. Mere seizure of property does not establish the personal relation of employer and employee. See *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332, 335-337; *The Standard Oil Co.* v. *Anderson*, 212 U. S. 215, 220; *Denton* v. *Yazoo & M. V. R. Co.*, 284 U. S. 305; *National Labor Relations Board* v. *Knoxville Pub. Co.*, 124 F. 2d 875, 882 (C. C. A. 6). And here there was nothing beyond seizure to make the workers public employees. They did not voluntarily accept government employment, and the Government never in any way treated them as government employees. The Government simply seized and enjoined to prevent a strike while the private parties continued their negotiations.[9]

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[9] Nor was there here "full and complete Government operation for its own account" of the kind which Justices Black and Douglas thought was present and supported the finding of a public employer-employee relationship in the *Mine Workers* case. During the period of government possession here the management of each carrier was permitted to continue its functions and to collect, retain, and expend revenues as before (1 R. 267, 306; 2 R. 40). The private carriers were given express authority to, and did, enter into agreements with petitioners on terms of employment which retroactively covered the entire period of government possession (1 R. 268). And the order terminating seizure arbitrarily set off the Government's claims for profits against the carriers' claims for use plus the assumption by the carriers of liability to third parties (2 R. 38-39). There was no effort whatsoever to make an accounting of profits or have a determination of fair use value. The Government did nothing here except (1) secure an injunction against the threatened strike and (2) maintain a light surveillance to enable it to report that the properties continued in uninterrupted operation.

For similar reasons, we think it clear that this case grew out of a private labor dispute within the terms of the Norris-LaGuardia Act, and not a dispute between petitioners and the Government as in the *Mine Workers* case. There the dispute arose over interpretation of a contract between the miners and the Government which had been in effect for some six months, and the Government brought suit to vindicate its own contract. There is no parallel in the present case. The dispute here certainly was a private one for the eleven months from June 1947 to May 10, 1948. The strike was called against the private carriers as a result of that dispute. The seizure and injunction suit, both of which took place within a period of eighteen hours before the time fixed for the strike, obviously were designed to prevent that strike, and thus grew out of the private dispute rather than any dispute with the Government. Not only was there never any dispute between petitioners and the Government, but there were never even any negotiations between the two, except for the conference with the Secretary of War a few hours after the seizure. On that occasion the Secretary asked only that petitioners cancel the strike called against the private carriers (Fdg. 11, 1 R. 227, 24), and he expressly refused to discuss terms of employment (1 R. 98, 103, 176, 179-180, 201, 312-313, 181). Consequently it seems too plain for debate that this case, filed less than eight hours after the seizure and only ten hours before the time set for the strike, grew out of a private dispute and therefore was beyond the jurisdiction of the District Court under the *Mine Workers* decision as well as other decisions of this Court. Compare *United States* v. *Hutcheson,* 312 U. S. 219; *United States* v. *American Federation of Musicians,* 318 U. S. 741.

In any event, such an extension of the *Mine Workers* decision should not be permitted without review by this Court. The question here is whether the Government, which under the Norris-LaGuardia Act is not entitled to

an injunction in a purely private dispute, can circumvent that congressional inhibition by seizure and nothing more. Not only does this question go considerably beyond the *Mine Workers* decision, but it is a question of general and vital importance. It is of course of great consequence to all unions in the railway field during time of war, in view of the Act of August 29, 1916. The Court is familiar with the broad seizure powers granted the Executive during the recent hostilities. The Government has taken the view that, even without congressional authorization, the President has the power in time of war to seize facilities whose operation is imperiled by a labor controversy. 40 Ops. Atty. Gen. No. 83, pp. 8-9 (1944). And of course for many purposes a technical state of war still exists and undoubtedly will exist for some time to come. Moreover, government seizure as a means of handling even peacetime labor disputes in industries of national importance has been frequently suggested both in Congress and by leading authorities on the subject. See, for example, Willcox and Landis, *Government Seizures in Labor Disputes*, 34 Cornell L. Q. 155 (1948). It is clear therefore that this is both a question of general importance, and a question of substance relating to the construction of a federal statute, which should be decided by this Court.

3. The ruling of the District Court that the threatened strike was unlawful and subject to injunction presents a question of general importance which should be settled by this Court, and is in conflict with applicable decisions of this Court.

The District Court concluded that there was a cause of action in equity because the threatened strike would imperil interstate commerce, the mails, and national health and safety (C. of L. 8(b)-8(f), 1 R. 235-236, 217-220). It further held that the Railway Labor Act and the Labor Management Relations Act, 1947, did not preclude issuance

of an injunction (C. of L. 6, 1 R. 235). We believe that, even assuming the District Court had jurisdiction, no equitable cause of action was shown here for the reason that petitioners' attempt to call a peaceful and non-violent strike involves no wrongdoing. Moreover, in the two named statutes Congress has plainly withheld authority for the exercise of injunctive process in such cases as this.

We need not explain to this Court the significance of this decision to petitioners and other unions, involving as it does the question of the right to strike. So far as we know, this is the first decision in a federal court for many years in which a peaceful strike has been held unlawful. Manifestly the question is of such general importance as to warrant review by this Court.

Moreover, we believe it clear that the decision below is inconsistent with many decisions of this Court and the lower federal courts. This Court has long held that peaceful strikes for legitimate purposes such as better wages and working conditions are lawful. *American Foundries* v. *Tri-City Council,* 257 U. S. 184, 209; *Labor Board* v. *Fansteel Corp.,* 306 U. S. 240, 253, 256. In the *Tri-City* case the Court said (page 209):

> The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital.

And long before Congress expressly recognized the lawfulness of such strikes, this principle was frequently applied by distinguished federal judges to uphold strikes in the railway field over the objection that interstate commerce and the mails were obstructed. *Arthur* v. *Oakes,* 63 Fed. 310, 320-321, 327 (C. C. A. 7, opinion by Justice Harlan); *Wabash R. Co.* v. *Hannahan,* 121 Fed. 563, 567-569, 577

(C. C. E. D. Mo., opinion by Judge Adams); see also *Thomas* v. *Cincinnati, N. O. & T. P. Ry. Co.*, 62 Fed. 803, 817 (C. C. S. D. Ohio, opinion by Judge Taft).

In more recent years Congress has by a number of statutes expressly recognized the right to strike in any industry. Section 20 of the Clayton Act (29 U. S. C. 52) provides that peaceful strikes shall not be considered "violations of any law of the United States". The Norris-LaGuardia Act recognizes the lawfulness of such strikes by denying the federal courts jurisdiction to enjoin them. And Section 13 of the National Labor Relations Act (49 Stat. 457), as amended by Section 101 of the Labor Management Relations Act, 1947 (29 U. S. C. Supp. 163) expressly recognizes the right to strike.

Moreover, the Railway Labor Act recognizes the lawfulness of strikes in the railway field. It provides a detailed system of mediation and cooling-off procedures during which changes in conditions are prohibited (Sections 2, 5 (First), 6, and 10). It prescribes no such prohibitions after those procedures have been satisfied, as they were here, thus clearly implying that thereafter strikes are lawful and not subject to injunction. This Court has in fact just recently said that the Railway Labor Act recognizes the lawfulness of strikes in that field. *Hunt* v. *Crumboch*, 325 U. S. 821. In overruling a contention that a concerted refusal to work for an interstate motor carrier violated the Sherman Act, the Court said (page 825):

> Acceptance of this contention would imply that workers do not possess the same privileges to choose or reject employment with interstate carriers as with other businesses. The entire history of congressional legislation, including the Railway Labor Act, 48 Stat. 1185, belies this argument.

The recent Labor Management Relations Act, 1947, further confirms the view that Congress intended there should

be no injunctions against strikes in the railway field. The Labor Management Relations Act, 1947, permits injunctions against strikes in national-emergency industries for a maximum period of eighty days, the Norris-LaGuardia Act being expressly suspended for that purpose (see Sections 206-209). Thereafter, the injunction must be discharged (Section 210). The Act is expressly made inapplicable to matters subject to the Railway Labor Act (Section 212). The obvious reason is that Congress felt that the Railway Labor Act already acomplished in its field what the Labor Management Relations Act was designed to accomplish in other industries affected with a public interest. Thus both statutes manifest a congressional purpose that, after the cooling-off mechanisms have been satisfied, strikes in the railway and other national-emergency industries are lawful.

It is clear, therefore, that under both the acts of Congress and the decisions of this Court the threatened strike here was lawful before seizure. We submit that for a number of reasons it did not become unlawful immediately upon seizure. *First,* assuming that all strikes against the Government are unlawful in the case of regular government employees, any such principle should not be extended to apply to such a forced and unique employer-employee relationship as is presented here. *Second,* when Congress has wanted to make strikes against the Government unlawful, it has done so by express legislation, as in Section 6 of the War Labor Disputes Act and as in Section 305 of the Labor Management Relations Act, 1947 (29 U. S. C. Supp. 188) which prohibits strikes by regular government employees. Clearly Congress felt that without express legislation such strikes would be lawful. *Third,* the threatened strike here actually was not against the Government but against the private carriers. Petitioners merely declined respondent's request to call off the strike already scheduled in the private dispute. There is

a vast difference between striking against the Government and rejecting a government request to revoke a strike call long before fixed as a means of supporting demands in a dispute with private parties.

The District Court apparently relied on the *Mine Workers* case and *In re Debs*, 158 U. S. 564, in deciding that the threatened peaceful strike was unlawful (1 R. 220). But that question was not involved in either of those cases. In the *Mine Workers* case this Court affirmed judgments of contempt and a judgment granting a preliminary injunction. No permanent injunction was involved. Under familiar principles, the Court was not therefore required to rule on the merits of the injunction, and no question as to the lawfulness of the strike was raised by the union or decided by the Court. Moreover, the suit there was for breach of contract, which has always been recognized as a wrong. And, finally, that strike was unlawful under Section 6 of the War Labor Disputes Act.

The *Debs* decision was based solely and expressly on the ground of violence and forcible obstruction. The Court on numerous occasions pointed out that the complaint alleged, and the facts showed, force and violence (158 U. S. at 568, 569, 570, 571, 577, 592, 598). Then, to make its holding crystal clear, the Court summed up as follows (page 598, emphasis supplied):

> The right of any laborer, or any number of laborers, to quit work was not challenged. The scope and purpose of the bill was *only to restrain forcible obstruction* of the highways along which interstate commerce travels and the mails are carried. And the facts set forth at length are *only* those facts which tended to show that the defendants were engaged in *such obstructions.*

Furthermore, whatever interpretation may be placed upon that case, it is no longer of any significance on this ques-

tion, since one of the purposes of the Norris-LaGuardia Act was to do away with the *Debs* doctrine in the field of labor disputes. While Congress in the Norris-LaGuardia Act spoke in terms of jurisdiction, it thereby obviously intended to reaffirm—in the most positive form—that peaceful strikes are lawful. Compare *United States* v. *Hutcheson*, 312 U. S. 219, 234-236. And that legislative policy was not affected by the *Mine Workers* decision, since the question of the lawfulness of the strike was not involved there, and in any event the strike was plainly wrongful.

We submit therefore that the question of the lawfulness of the threatened strike under the circumstances of this case—a question not decided in the *Mine Workers* case—is one of general and vital importance which should be decided by this Court.

4. The ruling of the District Court that the Executive Branch had a "right of action" presents a question of general importance which should be settled by this Court, is inconsistent with several acts of Congress, and also is in conflict with applicable decisions of this Court.

The decision of the District Court raises the novel and important question of whether, in any event, the executive branch of the Government has a "right of action" to invoke the powers of a court of equity to enjoin such a strike in the absence of an act of Congress granting that right, and particularly when several acts of Congress plainly demonstrate that the executive branch is not to have such a right. In both courts below, respondent argued that the President has a right of action whenever there is such a threatened interference with interstate commerce and transmission of the mails as will have grave effects upon the nation. That presumably was the trial

court's ground of decision (1 R. 218-220). We submit that this is a question which should be decided by this Court, and further that the decision of the District Court is plainly erroneous.

The Constitution does not of course give the President power to protect interstate commerce and transmission of the mails. On the contrary, those powers are expressly granted to Congress by Clauses 3 and 7 of Section 8 of Article I of the Constitution. In so far as pertinent here, the power given to the President by the Constitution is to "take Care that the Laws be faithfully executed" (Art. II, Sec. 3). And Article I, Section 8 of the Constitution, after enumerating the specific powers of Congress, provides that Congress shall have power (Clause 18):

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Thus it is clear that Congress alone has the power to formulate laws, not only those necessary to execution of its own powers but also those required to make effective the powers of the executive branch. The Executive, on the other hand, has only the power to carry into effect those laws which are enacted by Congress. *And Congress has enacted no law authorizing the President to institute action to prevent strikes which interfere with interstate commerce and transmission of the mails.*

Therefore the President has no constitutional authority to take such action, and Congress has given him no such right of action. Moreover, in view of the constitutional provisions mentioned, it would seem clear that the President has no broad residual right to intervene whenever there is a threatened interference with interstate commerce and the mails. Several Presidents have expressed the view that no such undefined residuum of power reposes in

the Chief Executive.[10] And it would seem to be a doctrine so extreme and dangerous as to be its own best answer. In present times a nation-wide strike in the rail, air, trucking, or maritime fields would have serious effects upon interstate commerce and the mails. A strike in any one of a number of important nation-wide industries, or even in local public utilities, would interfere with interstate commerce. Activities of management, as well as labor, in such industries could have similar effects. If interference with interstate commerce and asserted protection of the public interest are to be the controlling tests, the power of the President to regulate industries and labor through the courts is great indeed. The Congress, with its specific powers to protect commerce and the mails, would become largely reduced in function. The law of the land would be whatever the President might decide is in the public interest in each particular case. That is precisely the result which the fundamental doctrine of separation of powers was intended to prevent, as this Court and the founders of the Government have declared.[11]

The ruling of the District Court is inconsistent in prin-

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[10] Woodrow Wilson said: "Administration is merely the clerical part of government. Legislation is the originating force. * * * The power of making laws is in the very nature and essence of the power of directing, and that power is given to Congress." *Congressional Government*, pp. 272-273. "The President and his Cabinet must wait upon the will of Congress." Id. 282-283. William Howard Taft said: "The true view of the Executive functions is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest * * *" Taft, *Our Chief Magistrate and His Powers*, p. 139.

[11] See, for example, *Kilbourn* v. *Thompson*, 103 U. S. 168, 190-191; *Washington's Farewell Address;* Nos. 47 and 48 of *The Federalist* (Madison); John Adams, *Works* I, page 186.

ciple with the recent decision of this Court in *United States* v. *Standard Oil Co.*, 332 U. S. 301. There it was held that the United States had no right to recover for hospital expenses and loss of services of a soldier resulting from tortious conduct, since Congress had never created such liability. The Court said (page 314) that the question had to do with "determining and establishing the federal fiscal and regulatory policies which the Government's executive arm thinks should prevail in a situation not covered by traditionally established liabilities. Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours."

Moreover, in the instant situation, not only has Congress never created such a right of action in the President, but it has consistently and deliberately denied that right. We have shown previously that it is implicit in the Railway Labor Act that the injunctive process is not to be used to prevent strikes in the railway field. Section 2 of the Railway Labor Act (45 U. S. C. 151a) states that one of the purposes of the law is "to avoid any interruption to commerce or to the operation of any carrier engaged therein." This Act, then, is the manner in which Congress, in pursuance of its express power to regulate commerce, has decided to protect commerce from railway strikes. With full knowledge of the effects of such strikes on the nation, it has consistently chosen mediation and conciliation in preference to compulsion, both in this Act and in its predecessors.[12] As this Court has said, "the concept of mediation is the antithesis of justiciability" and it is plain from the Act that in this field "Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of

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[12] Erdman Act, 30 Stat. 424 (1898); Newlands Act, 38 Stat. 103 (1913); Title III, Transportation Act of 1920, 41 Stat. 456, 469; Railway Labor Act of 1926, 44 Stat. 577.

the Act indicate". *General Committee* v. *Missouri-Kansas-Texas R. Co.*, 320 U. S. 323, 333, 337; *Switchmen's Union* v. *Board*, 320 U. S. 297, 302. If the law should eventually be deemed inadequate, it is for Congress to change it. But it does not lie in the hands of the Executive to make that decision or to take action inconsistent with the course deliberately chosen by the legislature, simply because he may decide that such action is in the public interest.

That Congress does not consider the President to have the right to sue to enjoin strikes, and does not intend that he should have that right, is further confirmed by the provisions of Title II of the Labor Management Relations Act, 1947. Section 208 provides that in stated circumstances the President may direct the Attorney General to seek, and the federal courts shall have power to grant, an injunction limited in time against a strike or lock-out. If the President had such authority without an Act of Congress, there would have been no need for such legislation. Sections 209 and 210 provide that after a maximum of eighty days the Attorney General must request and the courts must grant discharge of the injunction, and the President shall then report to Congress making recommendations if any are necessary for legislative action. These provisions prove two things—*first* that the Executive Branch has no power to secure injunctions for longer than eighty days even in national emergency situations and *second* that, if further compulsory relief is required in the public interest, Congress shall take that action. That such was the understanding and intention of Congress is fully confirmed by the remarks of Senator Taft, co-author of the Act, on the floor of the Senate (93 Cong. Rec. (daily issue) 3951). Congress made this title inapplicable to railway labor matters because the Railway Labor Act was deemed to accomplish substantially the same result. Thus the Labor Management Relations Act, 1947, provides additional clear proof that in the opinion of Congress the executive branch does not and should not have the right to

sue to enjoin strikes in the railway or other national-emergency fields without specific congressional action.

Nor does it make any difference that the railways were in the possession and control of the Government. Respondent and the District Court point to the factors of interference with interstate commerce and protection of the public interest as giving the President a right of action. Those factors are the same whether private owners or the Government are in control of the facilities. The strike threatened here would have had an identical effect upon the nation whether it occurred before or after seizure. The Railway Labor Act, the Labor Management Relations Act, 1947, and also the Norris-LaGuardia Act represent a persistent congressional declaration of policy against strike injunctions in any industry and no matter how serious the strike may be. Under those statutes, the President clearly would have had no right of action before seizure (although the District Court held otherwise). It seems equally clear that he had no such right immediately upon seizure. Since the public interest is the same under either circumstance, the President's right to invoke equity on the basis of that test must be the same in either event.

In fact, to argue that whenever the President seizes railroads under the Act of August 29, 1916, he is immediately entitled to a strike injunction is to charge Congress with a gross oversight in the Railway Labor and Norris-LaGuardia Acts. Both were enacted long after the Act of 1916. The Railway Labor Act makes no differentiation between peacetime or wartime, or between privately or publicly held facilities. It recognizes railway strikes as lawful at any time after satisfaction of the cooling-off procedures. The Norris-LaGuardia Act was passed for the express purpose of preventing the Government as well as private owners from securing injunctions in the railway and other fields. It likewise does not distinguish on the basis of wartime or possession of facilities. It is impossible to believe

that Congress contemplated that the Executive could secure an injunction against railway strikes by the simple expedient of seizure and nothing more, yet remained silent on such an important exception to the coverage of the Norris-LaGuardia and Railway Labor Acts. To permit the Executive and the public to be informed of this ex post facto exception on the tenuous theory now advanced by the Government smacks too much of legislation by courts as an afterthought.

Again, the District Court relied on the *Mine Workers* and *Debs* cases (1 R. 218-220). But again we think it clear those cases are not in point. In the *Mine Workers* case, only the question of jurisdiction was raised and discussed. The question of the Executive's right of action was not involved. Moreover, the strike there was unlawful under the War Labor Disputes Act, and the Government was suing for breach of its own contract with the miners. The executive branch is of course entitled to vindicate its own contracts and to enforce the laws enacted by Congress. That decision has no bearing, however, on the right of the Executive to seek an injunction against a threatened strike on the ground of interference with interstate commerce and the mails.

It is true that in the *Debs* case the Court held that the Executive had a right to invoke equity jurisdiction to prevent a forcible and violent obstruction of interstate commerce and the mails, even though the Court identified no single act of Congress expressly giving him that right and cited only the "variety" of statutes such as the Interstate Commerce Act designed to protect the free flow of interstate commerce. But there are a number of answers to the attempted application of that case here. First, the case was decided in 1895 and in the fifty-four years since that decision this Court has never had occasion to reaffirm that doctrine in a suit brought to enjoin a strike. Second, as we have said before, the Norris-LaGuardia Act was enacted for the express purpose of doing away with the *Debs*

doctrine. Third, at the time of that decision there were no federal statutes establishing Congressional policy with respect to the right of workers to bargain collectively and to strike in support of their demands. Now, however, as pointed out by this Court in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 486, fn. 5, "the public interest in protecting interstate transportation from interference by strikes, recognized in the *Debs* case * * * has since been protected by legislation specially directed to that end." By that legislation Congress has denied the right of the Executive or anyone else to sue to enjoin strikes. Consequently, the *Debs* case has no force here.

We submit that this is a question of great importance which should be decided by this Court. There is surely no greater service to be performed by this Court to the Republic than in enforcing observance of the basic concept that ours is a government of divided powers. Otherwise, human nature being what it is, the destruction of this basic plan by the process of gradual encroachment of one department on the authority of another is a virtual certainty. As George Washington put it so well in his *Farewell Address:* "The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism * * * Let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed." Recent history abroad provides a realistic illustration that this truth is as fresh today as it was a century and a half ago. The instant plea of the Executive for authority heretofore deemed vested exclusively in the Congress amounts to an outright demand by one department of the government for this Court's permission to invade the constitutional province of another.

The theory of the District Court that the Executive can intervene by injunction whenever necessary to protect pub-

lic interest is an extremely far-reaching one which may be invoked under a variety of circumstances involving the activities of either labor or management. The likelihood of its being utilized in the case of union activities is underscored by the recent assertion of the Attorney General (see page 13, *supra*) that the inherent power of the President to deal with emergencies entitles him to enlist the aid of the federal courts in such situations. It is important to petitioners, other unions, and the nation that this question be authoritatively determined.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

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July 1949.

APPENDIX

Section 4 of the Norris-LaGuardia Act (29 U.S.C. 104) provides in part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> • • • •
>
> (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
>
> (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
>
> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

The Railway Labor Act (45 U. S. C. 151 *et seq*) provides in part:

> • • • •
>
> Sec. 2 • • • •
>
> First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.
>
> • • • •
>
> Sec. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

* * * *

Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been re-

quested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

* * * *

Sec. 10. If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation. . . .

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

Title II of The Labor Management Relations Act, 1947 (29 U. S. C. Supp. 171 *et seq*) provides in part:

* * * *

Sec. 206. Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the sev-

eral States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

Sec. 207. (a) A board of inquiry shall be composed of a chairman and such other members as the President shall determine, and shall have power to sit and act in any place within the United States and to conduct such hearings either in public or in private, as it may deem necessary or proper, to ascertain the facts with respect to the causes and circumstances of the dispute.

(b) Members of a board of inquiry shall receive compensation at the rate of $50 for each day actually spent by them in the work of the board, together with necessary travel and subsistence expenses.

(c) For the purpose of any hearing or inquiry conducted by any board appointed under this title, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., title 15, secs. 49 and 50, as amended), are hereby made applicable to the powers and duties of such board.

Sec. 208. (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or

engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

(b) In any case, the provisions of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", shall not be applicable.

(c) The order or orders of the court shall be subject to review by the appropriate circuit court of appeals and by the Supreme Court upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 29, secs. 346 and 347).

Sec. 209. (a) Whenever a district court has issued an order under section 208 enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this Act. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their em-

ployer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

Sec. 210. Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.

* * * *

Sec. 212. The provisions of this title shall not be applicable with respect to any matter which is subject to the provisions of the Railway Labor Act, as amended from time to time.

The Act of August 29, 1916 (10 U. S. C. 1361), the purported statutory authority for the seizure here, provides in part:

> The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable.

CITATIONS

CASES

	PAGE
Atherton Mills v. Johnston, 259 U. S. 13	4
Berry v. Davis, 242 U. S. 468	4
Board of Public Utility Commissioners v. Compania General De Tabacos De Filipinas, 249 U. S. 425	4
Brotherhood of Locomotive Firemen and Enginemen v. Toledo, Peoria & W. R. R., 332 U. S. 748	4
Brownlow v. Schwartz, 261 U. S. 216	4
Cincinnati Traction Bldg. Co. v. Pullman-Standard Car Mfg. Co., 25 F. Supp. 322 (Del. 1938)	3
Colonial Oil Co. v. American Oil Co., 3 F. R. D. 29 (E. D. S. C. 1943)	3
Delahanty v. Newark Morning Ledger Co., 26 F. Supp. 327 (N. J. 1939)	3
Electrical Corp. v. Thomas Co., 307 U. S. 241	4
Federal Savings & Loan Ins. Corp. v. First National Bank, 4 F. R. D. 313 (W. D. Mo. 1945)	3
Federal Trade Commission v. Goodyear Co., 304 U. S. 257	9
Fishgold v. Sullivan Corp., 328 U. S. 275	4
Hamilton Watch Co. v. Hamilton Chain Co., 43 F. Supp. 85 (R. I. 1942)	3
Henjes v. Aetna Ins. Co., et al., 39 F. Supp. 418 (E. D. N. Y. 1941)	3
Leonard & Leonard v. Earle, 279 U. S. 392	8
McGrain v. Daugherty, 273 U. S. 135	9
Merrimack River Sav. Bk. v. Clay Center, 219 U. S. 527	2
Montgomery Ward & Co. v. United States, 326 U. S. 690	4

PAGE

Southern Pacific Co. v. Interstate Comm. Comm., 219 U. S. 433 8

Southern Pac. Terminal Co. v. Interstate Comm. Comm., 219 U. S. 498 ..... 8, 9

St. Pierre v. United States, 319 U. S. 41 7

United States v. Anchor Coal Co., 279 U. S. 812 4

United States v. Freight Assn., 166 U. S. 290 ..... 8, 10

United States v. Mine Workers, 330 U. S. 258 ..... 2, 11

STATUTES AND MISCELLANEOUS

Federal Rules of Civil Procedure, Rule 41(a) 3

Norris-LaGuardia Act (29 U. S. C. 101 *et seq.*) 10, 11

War Labor Disputes Act (50 U. S. C. App. 1501-1511).. 11

In The

Supreme Court of the United States

October Term, 1949

No. 182

Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, and Switchmen's Union of North America,
Petitioners,

v.

United States of America

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

Respondent's brief in opposition is almost completely silent concerning the important issues on the merits which petitioners seek to have reviewed. Respondent argues instead that, "notwithstanding the possible importance of the questions which the petition attempts to have this Court

decide" (Br. in Opp. 6), certiorari should not be granted for the alleged reasons that: (1) Petitioners have no standing to attack the judgment of the Court of Appeals because that judgment, which vacated the injunction and directed dismissal of the complaint on the ground of mootness, gives petitioners the full relief they would obtain through reversal on the merits by this Court; (2) the Court of Appeals was correct in holding the controversy moot; and (3) the basic question respecting the right to enjoin strikes has been decided heretofore in the *Mine Workers* case. We shall reply to these untenable contentions in the same order below.

I.

In its first argument respondent says in effect that petitioners are not entitled to review *no matter how wrong the Court of Appeals may have been on the mootness question and no matter how important that issue and the additional issues on the merits may be.* There are at least two answers to this argument.

(1) Respondent's assertion that petitioners cannot secure greater relief through reversal on the merits is simply not correct. It is true, of course, that the judgment below ordered vacation of the injunction and dismissal of the complaint.[1] But that is by no means the extent of the relief petitioners would obtain by reversal on the merits.

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[1] In several places in its brief in opposition respondent states that the injunction has already been vacated. While the matter is of no significance here, that is actually not the case. The judgment of the Court of Appeals did say that the order of the district court was vacated, but the mandate of the Court of Appeals has been stayed pending review here. The judgment of the Court of Appeals does not of course become effective until its mandate issues and the trial court enters judgment accordingly. *Merrimack River Sav. Bk.* v. *Clay Center*, 219 U. S. 527. Consequently, the permanent injunction remains in existence and will continue to do so until final disposition of the case by this Court.

The specious nature of respondent's argument becomes apparent upon full analysis of the circumstances. It was respondent which sued for an injunction in the district court. Petitioners — who were defendants in the trial court — of course asked for no affirmative relief. As defendants there, they sought to have the complaint dismissed *on the merits. Such a dismissal would operate as res judicata and estoppel by judgment.* Petitioners sought the same relief in the Court of Appeals and ask for the same relief here. The judgment of the Court of Appeals, however, denies a judgment on the merits and therefore deprives petitioners of the protections of res judicata and estoppel by judgment. The present judgment has the same effect as a dismissal *without prejudice.*

Obviously such a dismissal without prejudice at this late stage is prejudicial to petitioners. Rule 41(a) of the Federal Rules of Civil Procedure provides that, after a case is at issue, plaintiff cannot dismiss except by stipulation or "upon order of the court and upon such terms and conditions as the court deems proper." And the federal courts have uniformly held that, with the progress of litigation, the defendant acquires a right to decision and the plaintiff loses the right to dismissal without prejudice. *Cincinnati Traction Bldg. Co.* v. *Pullman-Standard Car Mfg. Co.*, 25 F. Supp. 322 (Del. 1938); *Delahanty* v. *Newark Morning Ledger Co.*, 26 F. Supp. 327 (N. J. 1939); *Henjes* v. *Aetna Ins. Co. et al.*, 39 F. Supp. 418 (E. D. N. Y. 1941), affirmed 132 F. 2d 715 (C. C. A. 2); *Hamilton Watch Co.* v. *Hamilton Chain Co.*, 43 F. Supp. 85 (R. I. 1942); *Colonial Oil Co.* v. *American Oil Co.*, 3 F. R. D. 29 (E. D. S. C. 1943), affirmed 130 F. 2d 72 (C. C. A. 4), certiorari denied 317 U. S. 679; *Federal Savings & Loan Ins. Corp.* v. *First National Bank*, 4 F. R. D. 313 (W. D. Mo. 1945), affirmed 148 F. 2d 731 (C. C. A. 8).

The purpose of this rule respecting dismissals without prejudice is to protect the defendant from harassment.

Any other rule would permit a plaintiff to sue and dismiss at will, even until the defendant is penniless or worn out. Once a defendant has expended money and effort in defense of a suit, he acquires a right to a final adjudication which will put an end to such litigation through operation of the doctrine of res judicata or estoppel by judgment. It is that right which the judgment of the Court of Appeals denies petitioners. Clearly, therefore, if the decision of the Court of Appeals on mootness is wrong (as must be assumed for the purpose of this first argument of respondent), petitioners have been prejudiced by the ruling and are entitled to review to protect their right to an authoritative and final judgment on the merits.

(2) Respondent's argument also leads to discriminatory and irrational results. The judgment entered by the Court of Appeals is a form of judgment following as a matter of course after a holding of mootness.[2] The situation here is that (a) plaintiff secured a judgment on the merits in the trial court, which respondent says we may assume is errone-

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[2] Actually, the judgment deviates somewhat from what appears to be established practice. The correct procedure in such cases seems to be to reverse — rather than vacate — the judgment and remand the cause with instructions to dismiss the complaint. *Berry* v. *Davis*, 242 U. S. 468; *Atherton Mills* v. *Johnston*, 259 U. S. 13; *Brownlow* v. *Schwartz*, 261 U. S. 216, 218; *United States* v. *Anchor Coal Co.*, 279 U. S. 812; *Board of Public Utility Commissioners* v. *Compania General De Tabacos De Filipinas*, 249 U. S. 425; but see *Brotherhood of Locomotive Firemen and Enginemen* v. *Toledo, Peoria & W. R. R.*, 332 U. S. 748; *Montgomery Ward & Co.* v. *United States*, 326 U. S. 690. The obvious reason for reversal is to dispose of the injunction and at the same time eliminate the question of res judicata and estoppel by judgment. It might be suggested that vacating (as distinguished from reversing) the judgment, while it wipes out the injunction, may permit the judgment to stand as res judicata. We think it clear, however, that no court would make such a technical distinction but, if the question should be raised, would hold that under the circumstances the judgment of the district court is not res judicata against petitioners on the merits. If that is not the case, then clearly this Court should grant certiorari under several precedents squarely in point. *Electrical Corp.* v. *Thomas Co.*, 307 U. S. 241; *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, 281-283.

ous,(b)defendants appealed,(c)the Court of Appeals did not reach the merits but held the case to be moot on grounds which respondent says we may also assume to be erroneous, and(d)the defendants in the trial court, as petitioners here, seek review of the mootness issue in this Court in order to obtain appellate review of the merits. Respondent's position on the other hand is that, notwithstanding a wrong judgment of the trial court against the defendants on the merits, another wrong judgment on appeal to the effect that the case is moot automatically forecloses petitioners' right to seek review here on certiorari (Br. in Opp. 6-7). This is so, according to respondent, on the alleged ground that the ruling of mootness (and consequent vacation of the injunction and dismissal of the complaint) gives petitioners all the relief that can be afforded them in any event (id. 7).

But, in addition to the reason given above in point (1) of this reply brief, that result is absurd. If *plaintiff* had lost on the issue of mootness, of course no one could maintain that *it* was not entitled to seek review of that issue here on certiorari. But, according to respondent, when plaintiff wins on its assertion of mootness, defendants cannot have review here even though they are the losers on the mootness issue in the Court of Appeals. Respondent's argument has a like effect insofar as review on the merits is concerned. It would mean that if plaintiff lost on mootness and the merits, it could have review of both in this Court; but if plaintiff is able to persuade the Court of Appeals that the case has become moot, defendants are foreclosed from having the merits reviewed by any court, no matter how erroneous the ruling on mootness may be. We believe the appellate process embodies no such discrimination. Respondent cites no authority to support its novel view.

Moreover, the effect of respondent's argument would be that, if *on defendants' motion* the Court of Appeals holds the case moot, plaintiff would be entitled to seek review here; but where, as here, the holding of mootness is *on*

plaintiff's motion, defendants are not to be permitted review on certiorari. In other words, according to respondent, the availability of review on certiorari would depend upon which side makes the successful contention of mootness in the intermediate court *even though the question and the ruling of that court are precisely the same in both instances.* Thus the right to certiorari would not depend on the importance of the issues or the correctness of the decision regarding mootness, but on whether plaintiff or defendants made the successful motion. We believe the right to review on certiorari hinges on no such tenuous distinction.

These irrational inconsistencies, we believe, make the true situation apparent. The point is that respondent here raised the issue of mootness in the intermediate appellate court. Petitioners there contended that the case was not moot and that they were entitled to a final adjudication and reversal on the merits. But, instead, the Court of Appeals held the case to be moot. Since they lost and thereby were denied a final adjudication on the merits, to which they have a right if the case is not moot, petitioners are entitled to seek review here.

II.

Respondent next asserts that, in any event, the Court of Appeals' holding on mootness is correct. We think this argument is equally without merit.

The petition points out that the decision on mootness is of great public importance because it requires petitioners and other unions in like circumstances to refuse to settle labor disputes for the extended period necessary to secure authoritative review (Pet. 11-13). It also points out the great importance of the questions raised on the merits (Pet. 16, 17-35). Respondent nowhere denies the importance of either the mootness question or the questions on the merits, but on the contrary admits that those questions may be important (Br. in Opp. 6).

The petition also demonstrates that the decision on mootness is erroneous for several reasons: (1) There is a real probability of renewed controversy, as witnessed by the fact, among others, that the Government has seized the railroads of the nation three times in less than five years to settle railway labor controversies (Pet. 13). (2) Matters of great public importance are involved (Pet. 14). (3) The settlement was involuntary because it was forced upon petitioners by an injunction which denied them their lawful economic bargaining power (Pet. 15). (4) The district court decision will have a most serious influence and effect on all future collective bargaining between petitioners and the railroads, since it holds that a nation-wide strike by petitioners is unlawful and thereby deprives petitioners of rights necessary to enable them to exercise liberty of contract in bargaining with the carriers (Pet. 15). (5) Since petitioners must obey any anti-strike injunction and cannot long resist settlement when thus deprived of their lawful bargaining power, the practical effect of the ruling of the Court of Appeals is to foreclose petitioners forever from securing authoritative review on the question of their right to strike (Pet. 11-12, 16).

In general, respondent does not deny these facts. Respondent asserts only that, even though these things are true, the case is moot as a matter of law. This technical argument is rested upon the contention that the verbally separate and particular strike call which gave rise to the controversy is gone. Respondent also proceeds to argue that, since that strike threat no longer exists, "the controversy" must be dead and that it makes no difference that in substance the same controversy will recur. We sharply disagree with this legal conclusion, and believe that the decided cases unequivocally support our view.

The only case respondent cites for its contention that the probability of renewed controversy does not save a case from mootness is *St. Pierre* v. *United States*, 319 U. S. 41,

which is clearly inapplicable. There the court held the case moot because petitioner had already served the contempt sentence which he asked to have reviewed and because (1) he could have sought a stay and review of the judgment by the Supreme Court before serving the sentence and (2) in the event of another contempt he could similarly obtain Supreme Court review prior to serving his sentence. The Court distinguished *Southern Pac. Terminal Co.* v. *Interstate Comm. Comm.*, 219 U. S. 498, on the foregoing two grounds. They are clearly not present here. In the present case petitioners obviously must obey any future injunction issued by the district court, could not have any such injunction stayed pending review, and compliance with such injunction will compel settlement of the dispute before there can be review by this Court.

The many decisions of this Court holding that a case is not moot where there is a fair possibility of renewed controversy are cited at pages 13-14 of the petition. Respondent seeks to distinguish those cases by saying that in all of them the injunction had continuing effect in the same controversy or the acts sought to be restrained continued until the time of ultimate decision (Br. in Opp. 10). But just the opposite is true. In *Southern Pac. Terminal Co.* v. *Interstate Comm. Comm.*, 219 U. S. 498, and *Southern Pacific Co.* v. *Interstate Comm. Comm.*, 219 U. S. 433, the orders which the appellants sought to enjoin had by their own terms expired three and eight months, respectively, before decision by this Court. Obviously the judgments of this Court could have been effective only with respect to possible new controversies over future orders of like nature. In *United States* v. *Freight Assn.*, 166 U. S. 290, the association attacked by the Government had been dissolved before the case was heard by this Court. In *Leonard & Leonard* v. *Earle*, 279 U. S. 392, the year for which appellants sought a license had expired and the judgment of this Court could have had effect only as to new applications for other li-

censes for ensuing years. In *Federal Trade Commission* v. *Goodyear Co.*, 304 U. S. 257, the discriminatory practice complained of by the Commission had been discontinued and the contracts giving rise to the discrimination had been canceled, yet the Court said "discontinuance of the practice which the Commission found to constitute a violation of the Act did not render the controversy moot" (p. 260).

Respondent seeks to distinguish the leading case of *Southern Pac. Terminal Co.* v. *Interstate Comm. Comm.*, *supra*, by referring to a statement of the Court that the Commission's order might to some extent be the basis of further proceedings (Br. in Opp. 9-10). In making that statement, the Court expressly disclaimed the effect respondent here seeks for it. The Court there said: "But there is a broader consideration" (219 U. S. at p. 515). That broader consideration, the Court said, consisted of the facts that the order might be repeated, review might be defeated, and matters of public interest were involved (id.). Respondent also says that the Commission's order there was in effect a continuing one, even though its stated time limit had expired (Br. in Opp. 10). That also is incorrect. The order was not a continuing one and the Court did not suggest that it was. On the contrary, the Court pointed out that the "questions involved" in the order were continuing, as of course are the questions on the merits in the case at bar. Respondent's efforts to avoid the controlling effect of this decision are fully answered by the opinion in *McGrain* v. *Daugherty*, 273 U. S. 135, 182, where this Court itself interpreted the *Southern Pac. Terminal Co.* case to hold "that a suit to enjoin the enforcement of an order of the Interstate Commerce Commission did not become moot through the expiration of the order where it was capable of repetition by the commission and was a matter of public interest." Since in the case at bar the controversy is capable of repetition and is a matter of public interest — as respondent does not deny — the *Southern Pac. Terminal Co.* case is directly in point.

Respondent also attempts to distinguish *United States* v. *Freight Assn., supra,* by saying that the illegal association conduct there sought to be enjoined not only was capable of repetition but had already been repeated. It is true the Court mentioned a showing by the Government that, after dissolution of the association, most of the same defendants had again entered into a substantially similar agreement to remain in force for a specified time. But a full reading of the opinion makes it clear the Court referred to that fact only to demonstrate the possibility of repetition, and the real ground of decision was that there was a chance of renewed controversy in matters of public interest.

Respondent cites a long list of cases for the proposition that a court will not proceed to adjudication where there is no subject-matter on which its judgment can operate (Br. in Opp. 8-9). That general principle has no application here, however. The decisions of this Court demonstrate conclusively that there is a subject-matter on which its judgment can operate where the possibility of renewed controversy exists, questions of public interest are present, and the circumstances are such that parties might be deprived of their rights without ever securing authoritative review. The case at bar clearly meets those requirements.

Respondent says "it is proper to assume" that when the next such situation arises petitioners can secure review before being compelled to settle the dispute (Br. in Opp. 11). That assumption is entirely unwarranted and contrary to fact. It has always been recognized that anti-strike injunctions almost immediately force the workers into settlement by depriving them of their economic bargaining power while taking nothing away from the employers. That was the fundamental reason for the enactment of the Norris-LaGuardia Act depriving the federal courts of jurisdiction to issue injunctions of any duration in such matters. Since there is no possibility of securing a stay of such an injunction pending review and since the injunc-

tion necessarily forces the employees into early settlement, the practical effect of the decision below is to foreclose petitioners from securing review. And, even if that were not true, the effect of the ruling would be to require petitioners to refuse to settle their disputes with the carriers for the many months necessary to secure ultimate review, a result which would seem to be inconsistent with the public interest.

III.

Respondent finally asserts that "the general question of importance, namely, the right to enjoin strikes in industries seized * * * by the United States" has been decided in *United States* v. *Mine Workers,* 330 U. S. 258 (Br. in Opp. 11). But we have shown in our petition that the question here as to the applicability of the Norris-LaGuardia Act is vastly different from that in the *Mine Workers* case (Pet. 17-22). Moreover, the petition demonstrates that two questions of great importance not decided in the *Mine Workers* case are raised here. Those new questions are (1) whether the threatened peaceful strike was lawful and therefore not subject to injunction and (2) whether the Executive Branch of the Government has any "right of action" to invoke equity to protect interstate commerce and the mails in the absence of an act of Congress creating that right, particularly when Congress has in several statutes consistently denied that right. In the *Mine Workers* case this Court decided only the question of jurisdiction under the Norris-LaGuardia Act. The Court did not rule on the merits of the injunction or on the Executive Branch's right of action. Moreover, the strike there was unlawful under the War Labor Disputes Act and the Government was suing for breach of its own contract with the miners (Pet. 26, 33). Consequently, it is wholly inaccurate to say that the questions raised here have been decided in the *Mine Workers* case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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September 1949

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Contract provisions involved	2
Statement	3
Argument	6
Conclusion	11
Appendix	12

CITATIONS

Cases:	
Baez, Ex parte, 177 U. S. 378	8
Brownlow v. *Schwartz*, 261 U. S. 216	8
Chandler v. *Wise*, 307 U. S. 474	9
Cheong Ah Moy v. *United States*, 113 U. S. 216	9
Commercial Cable Co. v. *Burleson*, 250 U. S. 360	9
Director of Prisons v. *Court of First Instance of the Province of Cavite*, 239 U. S. 633	9
Jones v. *Montague*, 194 U. S. 147	9
Mills v. *Green*, 159 U. S. 651	9
Montgomery Ward & Co. v. *United States*, 326 U. S. 690	9, 10
Richardson v. *McChesney*, 218 U. S. 487	9
Southern Pac. Terminal Co. v. *Interstate Commerce Commission*, 219 U. S. 498	9
St. Pierre v. *United States*, 319 U. S. 41	9
United States v. *Alaska S. S. Co.*, 253 U. S. 113	9
United States v. *Hamburg-American Co.*, 239 U. S. 466	9
United States v. *Mine Workers*, 330 U. S. 258	11
United States v. *Trans-Missouri Freight Assn.*, 166 U. S. 290	10
Miscellaneous:	
Executive Order No. 9957 (13 F. R. 2503)	3

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 182

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, AND SWITCHMEN'S UNION OF NORTH AMERICA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 216–220)[1] is reported at 79 F. Supp. 485. The *per curiam* opinion of the Court of Appeals (2 R. 76) is reported at 174 F. 2d 160.

JURISDICTION

The judgment of the Court of Appeals was entered on April 25, 1949 (2 R. 77). The petition

[1] The record is printed in two volumes. Volume I containing the proceedings in the district court will be referred to as "R" and Volume II containing the proceedings in the Court of Appeals will be referred to as "2 R."

for a writ of certiorari was filed on July 11, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

In the face of a threatened strike by the three petitioning unions of railroad employees which would have paralyzed the national rail transportation system, the United States by executive order seized possession and control of the railroads involved. When the strike threat continued, an injunction was obtained by the United States. Thereafter the unions and the railroads entered into agreements settling their dispute, the strike threat disappeared, the Government returned possession and control of the railroads to their owners and the injunction was vacated.

The questions presented are:

1. Whether petitioners have standing to attack as improperly granted an injunction which has been vacated on grounds of mootness.

2. Whether settlement of the dispute and disappearance of the strike threat, the return of the railroads to private possession and control, and the vacation of the order enjoining the strike renders the case moot.

CONTRACT PROVISIONS INVOLVED

The pertinent contract provisions are set forth in the Appendix, *infra*, pp. 12–14.

STATEMENT

This case involves an injunction obtained by the United States to restrain a strike on the nation's railroads after their seizure by the Government (R. 2, 36). The injunction was subsequently vacated as a result of the settlement of the underlying labor dispute (2 R. 77). Petitioners are three unincorporated labor organizations representing employees in the railway industry (R. 231, 232, 233). After failing to settle by negotiation a dispute concerning wages and working rules, petitioners on January 16, 1948, issued a strike call with respect to railroad carriers throughout the nation to become effective on February 1, 1948 (R. 225, 252–259). The strike was postponed when the mediation machinery of the Railway Labor Act was invoked, but no settlement of the dispute was reached (R. 225–226).

On April 30, 1948, petitioners notified the carriers that a strike would commence on May 11, 1948, unless the issues in dispute were previously settled (R. 226). On May 10, 1948, pursuant to Executive Order No. 9957 (13 F. R. 2503), the United States, through the Secretary of the Army, took possession of and assumed control and operation of the railroads involved in the dispute (R. 227, 226).[2] The Secretary of the Army exercised complete authority over the operation of the seized railroads, although he dele-

[2] The Executive Order is reproduced in the record at R. 266–270.

gated managerial functions to the former management (R. 227–228).

After seizure, the chief executives of the petitioning unions advised the Secretary of the Army that the strike order previously issued for May 11, 1948, would not be cancelled (R. 227). Although involving only a small proportion of the railroad employees of the nation, the threatened strike would have resulted in an immediate shutdown of virtually all railroad operations, would have obstructed the performance of vital governmental functions, and would have imperiled the national health and safety (R. 230–231). On May 10th the United States sued for a permanent injunction against the threatened strike and obtained immediately a temporary restraining order which was extended by consent from time to time until June 10, 1948 (R. 233, 234). After hearings, a preliminary injunction was granted on June 10, 1948 and a permanent injunction on July 2, 1948 (R. 234, 236–237). The district court made clear that the injunction was limited to the immediate situation (R. 222).

On July 8, 1948, a proposal for settlement of the dispute was accepted by representatives of the unions and operators (2 R. 10, 26, 36). On the following day, as a result of the settlement, the Secretary of the Army terminated and relinquished possession, control, and operation of the seized railroads (2 R. 11, 27, 37, 38). Agreements formalizing the settlement were subsequently ex-

ecuted by the unions and the carriers, *infra*, pp. 12–14 (2 R. 28, 42, 60, 63, Pet. p. 9, n. 4).

Meanwhile, notices of appeal had been filed from the orders granting a preliminary and permanent injunction and the appeals were docketed in the court below (2 R. 78, 82). On August 2, 1948, the United States filed in the court below a motion to discharge the permanent injunction or, in the alternative, to remand the case to the district court for its discharge (2 R. 9) and on August 17, 1948, filed a motion for disposition of the cause on the grounds of mootness (2 R. 24). The Government's motions asserted that the underlying labor disputes between the carriers and the unions had been irrevocably settled, that possession, control, and operation of the railroads had been returned to private owners, that there was no longer any threat of a strike, that the need for injunctive relief was no longer present, and that these facts rendered the controversy moot (2 R. 12, 29). During the pendency of the appeal and before judgment, petitioners on September 14, 1948, filed a petition for a writ of certiorari in this Court. October Term, 1948, No. 277. Further proceedings in the court below were thereupon suspended, on petitioners' motion, before any action had been taken on the motion to discharge the injunction or to hold the case moot (2 R. 7–8). The petition for certiorari was denied on November 15, 1948. 335 U. S. 867. The case was thereafter heard on the original appeal by the court below which held

that "the controversy involved in these appeals has become moot," vacated the order appealed from, and remanded the causes to the district court with instructions to dismiss the complaint (2 R. 76, 77).

ARGUMENT

Notwithstanding the possible importance of the questions which the petition attempts to have this Court decide, there are no longer any actual issues upon which the judgment of this Court can have effect because (1) petitioners have obtained all the relief they can obtain if they prevail on the merits in this Court, and (2) events which have occurred since the initiation of the litigation have rendered the controversy moot.

1. This litigation arose out of the complaint filed by the United States for an injunction (R. 2–7). Petitioners opposed the granting of the injunction and sought to have the complaint dismissed (R. 29, 222). On the appeal, after a permanent injunction had been granted, petitioners requested "that the judgment below should be reversed and the cause remanded with instructions to the trial court to vacate the permanent injunction and dismiss the complaint" (Appellants' brief below, p. 22). After hearing the appeal, the court below by its judgment directed "that the orders of the said District Court appealed from in these causes be, and the same are hereby, vacated, and that these causes be, and they are hereby, remanded to the said District Court with

instructions to dismiss the complaint" (2 R. 77). It is difficult to perceive of any greater relief that can be afforded petitioners in the present litigation than has already been granted. Admittedly, if the court below assigned different reasons for its action, the opinion might prove advantageous to petitioners at some future time in some other litigation. We know of no situation, however, in which dissatisfaction with the reasons for a decision rather than with the judgment itself has been considered appropriate grounds for review by this Court.

2. Moreover, the court below was clearly correct in holding the controversy moot, even aside from its order vacating the injunction. The disputes which gave rise to the threatened strike were finally settled, and the strike threat growing out of these disputes, which led to seizure of the railroads by the United States, no longer existed. As a result of the settlement of the disputes and the dissipation of the strike threat, the railroads were returned to their owners. The reason for the injunction no longer existed and, since the injunction was intended to be limited to the particular situation, there was no subject matter with respect to which it could operate.

Although the command of the injunction was in general terms, the court made clear that it was intended to be limited to the particular strike threat which then confronted the national railway transportation system. When objection

was raised to the scope of the injunction on the ground, among others, that "it is not limited to this dispute," the court explained that the comprehensive wording was necessary to prevent evasion but that "it couldn't possibly comprehend anything except the substance of the issues before the Court" (R. 222). Furthermore, the Government's complaint demonstrates that it was directed to the specific railroad strike which was then threatening the nation (R. 2–6). Since this strike threat no longer existed and could not be revived because of the final settlement of the underlying dispute, the force of the injunction was spent. There was no conduct or threatened conduct which the injunction could restrain and the controversy was thus rendered moot. A determination of the legal questions raised by petitioners would therefore be a decision on an abstract question serving the sole purpose of an advisory opinion upon which petitioners and others might rely in the event that the facts of the instant situation should repeat themselves.

Since a judgment by the court below could afford petitioners no effectual remedy and since the effects of the issuance of the injunction could not be undone or in any way remedied, the case was properly held moot. "It is well settled that this court will not proceed to adjudication where there is no subject-matter on which the judgment of the court can operate." *Ex parte Baez,* 177 U. S. 378, 390; *Brownlow* v. *Schwartz,* 261 U. S. 216,

217; *Montgomery Ward & Co.* v. *United States,* 326 U. S. 690; *St. Pierre* v. *United States,* 319 U. S. 41; *Chandler* v. *Wise,* 307 U. S. 474, 477–478; *United States* v. *Alaska S. S. Co.,* 253 U. S. 113, 115–116; *Commercial Cable Co.* v. *Burleson,* 250 U. S. 360; *Director of Prisons* v. *Court of First Instance of the Province of Cavite,* 239 U. S. 633, explained in *United States* v. *Hamburg-American Co.,* 239 U. S. 466, 476, *Richardson* v. *McChesney,* 218 U. S. 487, 492; *Jones* v. *Montague,* 194 U. S. 147; *Mills* v. *Green,* 159 U. S. 651, 653; *Cheong Ah Moy* v. *United States,* 113 U. S. 216, 218.

The probability that a similar controversy may arise again is not sufficient to save a case from being considered moot. *St. Pierre* v. *United States,* 319 U. S. 41. Petitioners' contention that possibility of a renewed controversy is sufficient to prevent a case from becoming moot is without merit, and is not supported by the cases cited by them (Pet. 13–14). In *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S. 498, for example, upon which petitioners appear to place principal emphasis, the Court reiterated the rule that its decision must be capable of granting effectual relief in the pending litigation but pointed out (p. 515) that "in the case at bar", which involved an action to restrain the enforcement of an order of the Interstate Commerce Commission, "the order of the Commission may

to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings" and that the order in question was in effect a continuing one although its stated time limit had expired. Petitioners' further contention that the involvement of a public question which may require future solution is sufficient to prevent a case from being considered moot, is likewise without merit. Cf. *Montgomery Ward & Co.* v. *Unite States,* 326 U. S. 690. The case of *United States* v. *Trans-Missouri Freight Assn.,* 166 U. S. 290, and the various lower court cases cited (Pet. 14) do not support this contention. In the *Trans-Missouri* case, the Court held that the principal conduct sought to be enjoined, namely, the carrying out of illegal agreements, not only was capable of repetition but in fact had already been repeated by the adoption of new agreements similar to those which gave rise to the litigation. Thus, it is clear that in all of the cases relied upon by petitioners the judgments would have future operative effect in the controversy because of the continuing effect of the injunction or the continuance of the acts sought to be restrained.

Although the right to strike is admittedly one which should not be lightly curtailed, the need for decision in the instant case is difficult to perceive in the absence of any imminent threat to the exercise of this right. It would be highly speculative to assume that the particular combination of circumstances which gave rise to the specific issues

presented by the petition will recur in the near future. The general question of importance, namely, the right to enjoin strikes in industries seized, operated, and controlled by the United States, has been decided by this Court in *United States* v. *Mine Workers,* 330 U. S. 258. Petitioners' suggestions that authoritative review may be unreasonably delayed or avoided altogether are without merit. It is proper to assume, in the event a similar situation should arise in the future in which there is an actual judicial restraint on an existing or contemplated strike, that the judicial process will be sufficiently flexible to assure to petitioners expeditious review. There is, therefore, no occasion at the present time to consider the abstract question upon which petitioners seek the advisory views of this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST, 1949.

APPENDIX

The following are excerpts from documents executed by petitioners and the railroads on August 11, 1948:

> 1. This agreement made this 11th day of August, 1948, by and between the participating carriers listed in Exhibits A, B and C, attached hereto and made a part hereof and represented by the Eastern, Western, and Southeastern Carriers' Conference Committees, and the employees shown thereon and represented respectively by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen and Switchmen's Union of North America through their Conference Committees.
>
> IT IS HEREBY AGREED:
>
> * * * * *
>
> SECTION 20. This agreement is in full and final settlement of the dispute growing out of notices served by the employees parties hereto and by the carriers parties hereto, on or about June 20, 1947, in accordance with Section 6 of the Railway Labor Act, of intended changes in agreements affecting rates of pay, rules and working conditions.

> 2. This agreement made this 11th day of August, 1948, by and between the participating carriers listed in Exhibits A, B and C, attached hereto and made a part hereof and represented by the Eastern, Western and Southeastern Carriers' Conference Committees, and the employees shown

thereon and represented respectively by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, and the Switchmen's Union of North America through their Conference Committees.

IT IS HEREBY AGREED:

* * * * *

5. This agreement is in settlement of the dispute growing out of notices served by the employees parties hereto on or about September 30, 1947, in accordance with Section 6 of the Railway Labor Act, on the carriers parties hereto, of intended changes in agreements affecting rates of pay, rules and working conditions reading in part as follows:

"That effective November 1, 1947, all existing basic daily wage rates be increased thirty (30) per cent with a minimum money increase of $3.00 on the basic day. The same percentage of increase applied to the basic day will be applied to all arbitraries, miscellaneous rates, special allowances, and to daily and monthly guarantees."

subject, however, to the condition set forth in the Memorandum of Understanding signed concurrently with the signing of this agreement relating to further handling of certain phases of such wage increase request.

3. *Memorandum of Understanding.*

It is understood between the carriers represented by the Eastern, Western and Southeastern Carriers' Conference Committees, parties to the wage settlement executed this date and the employees parties thereto represented respectively by the Brother-

hood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen and Switchmen's Union of North America, that a wage request limited to the matter of the difference between the $1.24 per day, covered by the wage agreement of this date, and the amount requested in the notices served by the employees represented by those organizations on or about September 30, 1947 shall be given the same status as if it had been served as a new request on June 30, 1948. The purpose of this understanding is to avoid the serving of new notices by the employees represented by said organizations on individual carriers and negotiations thereon on such individual carriers. This understanding is made under the peculiar circumstances of this present wage settlement and shall establish no precedent for the handling of other cases.

U. S. GOVERNMENT PRINTING OFFICE: 1949